APR 4 1975

No. 74-450

Denied 4-14-75

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL
Petitioners

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE
Respondents

MOTION PURSUANT TO RULE 44(7) FOR LEAVE TO PRESENT ORAL ARGUMENT

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Mary Helen Sears

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL
Petitioners

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE
Respondents

MOTION PURSUANT TO RULE 44(7) FOR LEAVE TO PRESENT ORAL ARGUMENT

Under the provisions of Rule 44 (7), counsel for amicus curiae, Mary Helen Sears, petitioner in No. 74-584, respectfully requests leave to present oral argument not in excess of fifteen (15) minutes in length.[1]

Such argument will, it is believed, provide assistance to the Court not otherwise available for the following reasons:

1. Petitioners and respondents are at one in urging that exemption 3 be accorded a breadth and sweep in-

---

[1] The Brief Amicus Curiae of Mary Helen Sears was filed, with the consent of the parties, on March 17, 1975.

consistent with the very purpose and existence of the FOI Act.[2]

Absent the requested argument, the Court will hear only an essentially one-sided view of the question presented with petitioners and respondents differing as to the narrow issue of whether § 1104 of the FAA Act "specifically exempts" certain "SWAP reports" from public disclosure but concurring on the general principle that exemption 3 blankets virtually *all* specific nondisclosure statutes. In consequence, the Court may inadvertently be misled into devitalizing the FOIA by interpreting exemption 3 so as to restore to government agencies the broad discretion to withhold and suppress information which Congress intended the FOIA to destroy.

2. Amicus is particularly qualified to present argument on the reasons why the FOIA's exemption 3 is to be strictly and narrowly construed to curb the exercise of agency discretion in suppressing information. Amicus has presented the identical question in the co-pending petition in No. 74-584, disposition of which has been deferred. In No. 74-584, the "nondisclosure" statute at issue is 35 U.S.C. § 122, which differs widely from § 1104 of the Federal Aviation Act involved in this case.

3(a). The petitioners have stated that the

> ". . . issue presented in our petition broadly involves the scope of exemption 3 itself and not merely its application to the particular . . . statute involved in this case.

---

[2] Petitioners seek an affirmative answer to the single question presented:

> "Exemption 3 of the Freedom of Information Act provides for nondisclosure of 'matters that are specifically exempted from disclosure by statute'. The question is whether this exemption covers all material with respect to which Congress by statute has provided for nondisclosure upon various terms, including statutes that give government officials discretion to decide whether to disclose."

> "The question we are asking the Court to decide is whether exemption 3 applies to all specific non-disclosure statutes. . . . If our view of exemption 3 is sustained . . . it will largely resolve the issue of its application to nearly 100 statutes which provide in various ways for the confidential treatment of government material." (Reply Memo Supporting Petition in No. 74-450, pp. 1-2)

Petitioners include both § 1104 and 35 U.S.C. § 122 in the "nearly 100" to which exemption 3 is said to apply.

(b). The respondents have fashioned a synthetic "three criteria" test, devoid of judicial and legislative support, by which they say those statutes that "specifically exempt" documents from disclosure under exemption 3 may be identified. Respondents have applied this synthetic test to suggest that § 1104 is unique in not meeting any of these criteria, and hence falls outside the ambit of exemption 3. At the same time, by ignoring the actual language of 35 U.S.C. § 122 and focusing upon an oversimplified, out-of-context interpretation of it (R. Br. 14-15), respondents have concluded that § 122 meets the "three criteria" test and is clearly a statute that "specifically exempts" as required by exemption 3.

(c) Respondents' artificial "three-criteria" test for qualifying a statute as one which "specifically exempts" under exemption 3, contemplates that *all* statutes which exhibit at least two of the following three criteria are within exemption 3: (i) "describe particularized records,", (ii) "prohibit the disclosure of any documents" rather than allowing the agency "discretion to refuse to disclose", or (iii) "set . . . standards for determining whether to release a document other than the 'public interest' test" (R.Br. 10).

Respondents state that they have

> "analyzed various statutes plainly falling within exemption 3's coverage and identified three characteristics which are found in varying degrees in all of those statutes. . . ." (R.Br. 13)

and that

> "It is the wholly open-ended nature of section 1104 that distinguishes it from all of the statutes *which properly* create exemptions under exemption 3. Thus, statutes clearly within the third exemption prohibit disclosure of . . . applications for patents (35 U.S.C. § 122). . . . While there will inevitably be disputes about the meaning of even well defined terms, the limitation on access . . . is confined under those statutes to types of documents preselected by Congress and is not left entirely to the discretion of the agency, as is true under § 1104." (R. Br. 14-15)

In fact, § 122 is at least equally as "open ended" as § 1104. The convenient interpretation of § 122 by respondents as defining precisely a class of documents—"particularized records"—preselected by Congress is misleading.

This fact is apparent from a consideration of the actual pertinent language of the two statutes in tandem:

(i) Respondents' first criterion—description of "particularized records".

The "confidence" or "limitation on access" provisions of § 122, subject to the conditions recited in that statute, extend to

> "Applications for patents . . . *and* . . . *information concerning the same*"

i.e., essentially *all* "information" in Patent Office files and custody—hardly a description of "particularized records".

Similarly, § 1104's "limitation on access" applies, subject to conditions recited therein, to

> "information contained in *any application, report or document filed . . . or of information obtained* by the Board or the Administrator. . . ."

—again, essentially all "information" in the custody of the agency.

Thus, contrary to R.Br. 15, neither § 122 nor § 1104 recites in "well defined terms . . . types of documents preselected by Congress". § 122's "limitation on access" to "applications for patents . . . *and* information concerning the same" manifestly does not satisfy this prerequisite any more than § 1104's limitation on access to "information contained in . . . documents . . . or obtained . . .".

(ii) A similar situation applies to respondents' point (ii), *i.e.*, a prohibition on "disclosure of any documents" rather than allowing the agency "discretion to refuse to disclose".

Under *both* statutes, the limitation on access is left to "the discretion of the agency". *Neither* statute *prohibits* "the disclosure of any documents".

Thus, under § 122, the access may be had to applications and information

> ". . . in such special circumstances as may be determined by the Commissioner"

—*i.e.*, in his unbridled discretion.

Under § 1104, access may be had to documents and information *except*

> ". . . when in their [the Board's or Administrator's] *judgment* a disclosure would adversely affect the in-

> terests of such [objecting] person and is not required in the interests of the public"

—again, in agency discretion.

(iii) With regard to respondents' point (iii), *i.e.*, the setting of "standards for determining whether to release . . . other than the 'public interest' test", § 122 does not even attempt to suggest *what* "special circumstances" may guide the exercise of agency discretion. The FAA Act's § 1104 embodies the "public interest" test by requiring a balancing of the objecting party's interest against that of the public but sets no other standard.

In short, respondents' "three-criteria" test is not only artificial, but any careful consideration leads to the conclusion that 35 U.S.C. 122 when judged by its "criteria" is in the very same relative posture as § 1104 of the FAA.

4. § 122 differs fundamentally from § 1104 in that it *prohibits* the exercise of agency discretion to justify *withholding* of any "applications for patent . . . and . . . information concerning the same", disclosure of which is

> ". . . necessary to carry out the provisions of any act of Congress".

This important and unique provision, ignored by the court below, by the government in opposing the petition in No. 74-584 and by respondents' three-criteria test, must be construed, *inter alia*, in light of the later enacted FOIA itself to ascertain whether § 122 and similarly worded statutes *can* fall within exemption 3.

5. Neither petitioners nor respondents have come to grips with the fundamental point which militates *against* the sweep they attribute to exemption 3—*i.e.*, that Congress intended by enacting the FOIA to superimpose *pro tanto* upon *all non*disclosure statutes that ostensibly afford agencies discretion to withhold information the

guidelines for its exercise that are expressed in exemptions 1-9 of the FOIA itself and otherwise to prohibit exercise of agency discretion in favor of withholding information.

By this interpretation which is the only one consonant with the legislative history of the FOIA, neither § 122 nor § 1104 nor most others of the "100" statutes "specifically exempt" documents from disclosure within the narrow meaning of exemption 3. This significant—we believe controlling—point, *should* be heard and weighed in order to resolve the question presented in this case.

Respectfully submitted,

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006

Attorney for Petitioner
in No. 74-584